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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. 798

FRANK M. TACK and LOIS V. TACK, Now THOMPSON, Life Tenants, and HARRY S. TACK, A Contingent Remainderman, Petitioners

v.

MELLON NATIONAL BANK AND TRUST COMPANY, Trustee of the Estate of FLORENCE TACK NORVELL, Deceased, and ROBERT B. McKINLEY, Guardian and Trustee Ad Litem, Sur Account Entitled Fifth Account of said Trustee, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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INDEX

PAGE

Opinion below 2

Jurisdiction 2

Questions Presented 2

Statutes and constitutional provisions involved.... 4

Statement 7

Reasons for granting the writ 13

Conclusion 31

Appendix 32

CITATIONS

CASES:

American Security & Trust Co., et al., Executors, 24 B.T.A. 334 18

Bailey v. Alabama, 219 U. S. 219 21

Catherwood, Settlor, Trust of Daniel B. Cummins, 405 Pa. 61 (1961) 9, 11, 15, 28, 29, 30

Commonwealth v. Steward, 338 Pa. 9 (1940) 15

Crawford's Estate, 362 Pa. 458 (1949) 15

Guinzburg v. Anderson, 51 F. (2d) 592 18

Hall v. White, 48 F. (2d) 1060..... 18

Harkness Estate, 283 Pa. 464 (1925) 22, 15

Heiner v. Donnan, 285 U. S. 312 (1931) .....13, 18, 19, ...20, 21, 22, 26, 27

Hoeper v. Tax Commission, 284 U. S. 206 .....13, 17, 20

Manley v. Georgia, 279 U. S. 1..... 21

Schlesinger v. Wisconsin, 270 U. S. 230 .....13, 17, ...18, 19, 20, 27

State Tax Commission v. Robinson's Executor, 234 Ky. 415 18

STATUTES: PAGE

Act of July 3, 1947, P. L. 1283, Principal and Income Act, 20 P. S. 3470:

Sec. 1 ..... 4, 24, 27, 29

Sec. 3(1) 5, 11, 13, 14, 17, 24, 25, 26, 27, 29

Sec. 5(1) 5, 11, 13, 14, 17, 20, 25, 26, 27, 29

Sec. 5(2) 5, 12, 14

Article 1 of the Constitution of the Commonwealth of Pennsylvania:

Sec. 1 ..... 5, 13, 14, 29

Sec. 9 ..... 6, 13, 14, 29

Fourteenth Amendment to the United States Constitution 6, 18, 19, 20, 21, 27

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MELLON NATIONAL BANK AND TRUST COMPANY, Trustee of the Estate of FLORENCE TACK NORVELL, Deceased, and ROBERT B. McKINLEY, Guardian and Trustee Ad Litem, Sur Account Entitled Fifth Account of said Trustee, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered at Nos. 88, 89 and 90 March Term, 1964, on Appeals from the Decree of the Orphans' Court of Allegheny County at No. 4403-A5 of 1940 and dated August 26, 1963. Such Appeals, involving identical questions, were consolidated for hearing, consideration and decision, all of the issues involved being decided against the Petitioners. There are special and important reasons for the granting of the Writ prayer for, because the Supreme Court of Pennsylvania has decided federal questions of substance in a way clearly not in accord with applicable decisions of this Court.

OPINION BELOW

The Opinion of the Supreme Court of Pennsylvania (Appendix, *infra*, pp. 32-44) is officially reported in 415 Pa. 427 (1964), ... A. 2d .....

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered October 7, 1964, (Appendix, *infra*, pp. 32, 43. The jurisdiction of this Court is invoked under 28 U. S. C., Section 2101(c).

QUESTIONS PRESENTED

1. Are the first sentence of Section 5(1) of the Pennsylvania Principal and Income Act of 1947, and the first sentence of Section 3(1) thereof in so far as it excludes from income and deems as principal all dividends on corporate shares payable in shares of the corporation itself of the same kind and rank as the shares on which such dividend is paid, unconstitutional as a violation of Article I, Sections 1 and 9 of the Pennsylvania Constitution and the Fourteenth Amendment of the Constitution of the United States in that each seeks to establish a conclusive statutory presumption which is contrary to the actual fact and thus deprive the Life Tenants here of their property without due process of law?

(Answered in the negative by the Court below.)

Questions Presented.

2. Are the first sentence of Section 5(1) of the Pennsylvania Principal and Income Act of 1947 and the first sentence of Section 3(1) thereof in so far as it excludes from income and deems as principal all dividends on corporate shares payable in shares of the corporation itself of the same kind and rank as the shares on which such dividend is paid, void because repugnant to Section 1 of the same Act?

(Answered in the negative by the Court below.)

3. Is the first sentence of Section 5(2) of the Pennsylvania Principal and Income Act of 1947 unconstitutional as a violation of Article I, Sections 1 and 9 of the Pennsylvania Constitution and the Fourteenth Amendment of the Constitution of the United States in that it seeks to establish a conclusive statutory presumption which is contrary to the actual fact and thus deprive the Life Tenants here of their property without due process of law?

(Answered in the negative by the Court below.)

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Act of the General Assembly of the Commonwealth of Pennsylvania of July 3, 1947, P. L. 1283, Principal and Income Act, 20 P. S. 3470:

Section 1. Definition of Terms.—"Principal" as used in this act means any realty or personalty which has been so set aside or limited by the owner thereof, or a person thereto legally empowered, that it and any substitutions for it are to remain in trust perpetually, or are eventually to be conveyed, delivered or paid to a person, while the return therefrom, or use thereof, or any part of such return or use, is in the meantime to be taken or received by, or held for accumulation for, the same or another person.

"Income" as used in this act means the return derived from principal.

"Tenant" as used in this act means the person to whom income is presently or currently payable, or for whom it is accumulated, or who is entitled to the beneficial use of the principal presently and for a time prior to its distribution.

"Remainderman" as used in this act means the person ultimately entitled to the principal, whether named or designated by the terms of the transaction by which the principal was established, or determined by operation of law.

* * * * * * *

Section 3. Income and Principal; Disposition. —(1) All receipts of money or other property, paid or delivered as rent of realty, or hire of personalty, or dividends on corporate shares, payable other than in shares of the corporation itself of the same kind and rank as the shares on which such dividend is paid, or interest on money loaned, or interest on or the rental or use value of property wrongfully withheld or tortiously damaged, or otherwise in return for the use of principal, shall be deemed income, unless otherwise expressly provided in this act.

* * * * * * *

Section 5. Corporate Dividends and Share Rights.—(1) All dividends on shares of a corporation, forming a part of the principal, which are payable in the shares of the corporation itself of the same kind and rank as the shares on which such dividend is paid shall be deemed principal. * * *

(2) All rights to subscribe to the shares or other securities or obligations of a corporation, accruing on account of the ownership of shares or other securities in such corporation, and the proceeds of any sale of such rights shall be deemed principal. * * *

Article 1 of the Constitution of the Commonwealth of Pennsylvania:

Section 1. Natural rights of mankind: All men are born equally free and independent, and have certain inherent and indefensible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting

property and reputation, and of pursuing their own happiness.

Section 9. Rights of accused in criminal prosecutions: In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy trial by an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land.

The Fourteenth Amendment to the United States Constitution provides, inter alia:

> No State shall * * * deprive any person of * * * property without due process of law. * * *

STATEMENT

These were appeals to the Supreme Court of Pennsylvania from the dismissal by the Orphans' Court of Allegheny County of Exceptions to the Opinion of Boyle, P. J. of said Court and Decree based thereupon, which dismissed the Exceptions and Objections filed by the Life Tenant and Contingent Remainderman Petitioners to the Fifth Account of Mellon National Bank and Trust Company, Trustee under the Will.

The decedent died August 24, 1921. The corpus of the Trust is shown in the Fifth Account of the Trustee at a balance of $453,510.63, which does not represent market values, but, rather, the Trustee's "carrying" values.

The Trust arose under the residuary clause of decedent's Will and continues at this time for the payment of all of the income equally to decedent's nephew and niece, the Life Tenant Petitioners. The Will further provides that upon the death of either of them leaving children the deceased parent's share of the income shall be paid to his or her children, share and share alike, until the death of the survivor of such nephew and niece, and upon the death of such survivor the residuary estate shall be divided into as many equal parts as there are then living children of such nephew and niece, with one share to be paid and delivered to each child absolutely upon attaining the age of twenty-one (21) years. If both said nephew and niece die without children, the whole of the residuary estate, subject to the life estate given to decedent's husband (who died September 6, 1939), shall go to her brother, Harry S. Tack, the Contingent Remainderman Petitioner, absolutely; and in the

event he shall have died before said nephew and niece and the latter die without leaving children, then the whole of the residuary estate shall pass to decedent's husband, absolutely, and if he be not living at the death of the survivor of said nephew and niece, then the residuary estate shall be divided equally among such of the mother of decedent's husband and his brothers as may be living at the death of said husband, with the children if any living at said date taking the share which their father would have taken if living.

Eleven Exceptions to the Fifth Account of the Trustee were filed on behalf of the Life Tenant and Contingent Remainderman Petitioners, all of which Exceptions except four were withdrawn and the Exceptants then requested and were granted leave to file an additional Exception. These Exceptions involved distributions in the form of so-called stock dividends and/or stock splits by Standard Oil Company of Indiana, Standard Oil Company of New Jersey and Socony Mobil Oil Company, Inc. on shares of stock then held by the Trustee, with the Life Tenant and Contingent Remainderman Petitioners contending that the failure of the Trustee to pay to the Life Tenants the shares of stock so claimed by them deprived such Life Tenants of their property without due process of law and without just compensation therefor, contrary to the provisions of the Constitution of Pennsylvania and the Fifth and Fourteenth Amendments to the Constitution of the United States.

In its Petition for Distribution on said Fifth Account the Trustee originally requested the Orphans' Court to approve the distribution to the Life Tenants of certain amounts of cash arising from sales of rights

on stocks of five companies held by the Trustee and of 326 shares of the capital stock of Socony Mobil Oil Company, Inc., but in its Supplemental Petition for Distribution the Trustee took the position that in view of the decision of the Supreme Court of Pennsylvania in *Catherwood Trust,* 405 Pa. 61 (1961), "the entire apportionment matters referred to in the Petition for Distribution need not be presented." At a continued audit hearing held on April 6, 1962, the Exceptants filed Objections to the action of the Trustee withdrawing the suggested schedule of distribution.

More specifically, the claims of the Life Tenant Petitioners herein are for distribution to them of the following shares of stock and amounts of cash, having values in the aggregate in excess of $750,000:

(a) 229.93 shares of the capital stock of Standard Oil Company of Indiana, representing part of a 100% stock dividend on 701 shares of the stock of that company declared September 23, 1954, and paid December 1, 1954, the balance of 471.07 shares received by the Trustee as such dividend having heretofore been paid to the Life Tenants;

(b) 8,412 shares of the capital stock of Standard Oil Company of New Jersey, representing a so-called three-for-one split on 4,206 shares of said stock held on February 10, 1956, and received on March 16, 1956, or in the alternative not less than 6,840 of said shares;

(c) An additional 202.946 shares of the capital stock of Standard Oil Company of New Jersey, representing further Income in such shares;

(d) 326 shares of the common stock of Socony Mobil Oil Company, Inc. (comprised of 303 shares, being

all be ½ share of a 25% stock dividend received by the Trustee on May 7, 1956, on 1,214 shares of the common stock of said company and 23 shares purchased in the exercise of rights on February 14, 1957), and a total of $717.11 in cash (comprised of $211.84 received by the Trustee on the sale of 1,214 rights on Socony Mobil Oil Company stock on October 13, 1952, $29.56 received by the Trustee on June 21, 1956, on the sale of a half share of such stock, and $475.71 received by the Trustee on February 7, 1957, on the sale of 1,287 rights on the stock of said company);

(e) $785.09 cash received by the Trustee in 1952, 1955 and 1958 on sales of rights on the capital stock of Peoples Gas Light & Coke Company;

(f) $823.44 cash received by the Trustee in 1953 and 1956 on sales of rights on the capital stock of Sinclair Oil Corporation; and

(g) $1,511.45 cash received by the Trustee on December 12, 1957, on sales of 12,618 rights on the capital stock of Standard Oil Company of New Jersey.

The Trustee under the Will in its Petition for Distribution filed in June, 1961, declared and admitted that *all* of the shares of capital stock and *all* of the amounts of cash referred to and described in paragraphs (d) through (g) immediately above belonged to the Life Tenants herein, but such declarations and admissions the Trustee withdrew in its Supplemental Petition for Distribution after the decision of this Court in *Catherwood, supra.*

The Learned Auditing Judge of the Orphans' Court in his Opinion concluded, and the Court *en banc* affirmed, that because "The decision of the Supreme Court in

Catherwood Trust, *supra,* is the law of the Commonwealth" and "is binding upon this Court until changed or overruled", *none* of the shares of stock and *none* of the amounts of cash claimed by the Life Tenants as above enumerated in paragraphs (a) through (g) were "Income" belonging and distributable to the Life Tenants; that all such shares of stock and amounts of cash were "Principal" to be decreed to the Trustee under the Will; and that "Accordingly the exceptions and objections filed will be dismissed." The Court's Decree of April 29, 1963, carried out this determination, which was affirmed by the Court *en banc,* in the Opinion and Decree of August 26, 1963.

All of the evidence pertinent to the issues here involved had been stipulated and found by the Orphans' Court as such. The Stipulation of Facts was not printed in the Record in the Supreme Court of Pennsylvania, although Counsel for the parties therein entered into an Agreed Statement of Facts based upon the Stipulation of Facts, which agreed statement formed part of the printed Record in the Supreme Court and in which agreed statement reference was made to the exhibits forming part of the Stipulation of Facts, including those covering voluminous financial data on the Standard Oil Company of Indiana, Standard Oil Company of New Jersey and Socony Mobil Oil Company, Inc., none of which financial data was included in the printed Record because of its size and since reference could readily be made thereto in the Stipulation of Facts forming part of the original record.

All of the exceptions and objections pertaining to the stock distributions alleged that Sections 3(1) and 3(1) of the Principal and Income Act of 1947 are un-

constitutional in that they seek to establish a conclusive statutory presumption which is contrary to the actual fact and deprive the Life Tenants of their property without due process of law, and the exceptions and objections pertaining to the amounts of cash involved in the sales of rights on corporate shares allege that Section 5(2) of said Act is unconstitutional for the same reason.

The questions raised by the Appellants in The Orphans' Court were three in number, as set forth above in Questions Presented. All of these questions were negatived by the Learned Auditing Judge and by the Court *en banc* and all Exceptions pertaining thereto dismissed. The Supreme Court of Pennsylvania affirmed.

Appellants are filing with this Petition nine copies of the printed Record filed at Nos. 88, 89 and 90, March Term, 1964, in the Supreme Court of Pennsylvania. Such Record shows (pp. 42a through 50a) that the federal questions sought to be reviewed were raised by Exceptions filed by the Appellants to the Fifth Account of the Mellon National Bank and Trust Company, Trustee under the Will, and by Objection of the Appellants to Certain Statements, Conclusions and Action of the Trustee set forth in the Supplemental Petition for Distribution filed by said Trustee on its Fifth Account. The Opinion of the Orphans' Court of Allegheny County and its Decree thereon appear on pages 50a to 64a of said Record, while the Exceptions of the Appellants to such Opinion and Decree, raising the constitutional questions here involved appear on pages 64a through 77a of said Record. The recognition of such constitutional questions by the Supreme Court of Pennsylvania and its determination thereupon are shown in the Appendix, *infra*, pp. 32-44.

REASONS FOR GRANTING THE WRIT

The decision below is in direct conflict with the decisions of this Court in *Schlesinger v. Wisconsin,* 270 U.S. 230, *Hoeper v. Tax Commission,* 284 U.S. 206, and *Heiner v. Donnan,* 285 U.S. 312.

Briefly, the position of the Petitioners is that the Life Tenants have a vested property interest or estate in the principal constituting the trust created under the will of the decedent which the legislature may not qualify or extinguish; that the Life Tenants are entitled to all the return derived from such principal; that the first sentence of Section 5(1) of the Principal and Income Act of July 3, 1947, P. L. 1283, 20 P. S. Section 3480, providing that "All dividends on shares of a corporation, forming a part of the principal, which are payable in the shares of the corporation itself of the same kind and rank as the shares on which such dividend is paid shall be deemed principal" seeks to establish a conclusive statutory presumption which is contrary to the actual fact and thus deprive the Life Tenants of their property without due process; that the first sentence of Section 3(1) of the Principal and Income Act aforesaid in so far as it excludes from income and deems as principal all dividends on corporate shares payable in shares of the corporation itself of the same kind and rank as the shares on which such dividend is paid likewise seeks to establish a conclusive statutory presumption which is contrary to the actual fact and thus deprive the Life Tenants of their property without due process; that as the result thereof such provisions of Section 5(1) and Section 3(1) of said Act are unconstitutional as a violation of Article I, Sections 1 and 9 of the Pennsyl-

vania Constitution and the Fourteenth Amendment of the Constitution of the United States; that the first sentence of Section 5(1) of the Principal and Income Act of 1947 and the first sentence of Section 3(1) of said Act in so far as it excludes from income and deems as principal all dividends on corporate shares payable in shares of the corporation itself of the same kind and rank as the shares on which such dividend is paid, are void because repugnant to Section 1 of the same Act; that all of the shares of corporate capital stock claimed by the Life Tenants in their Exceptions pertaining to 229.93 shares of Standard Oil Company (Indiana), 8,614.946 shares of Standard Oil Company (New Jersey) and 326 shares of Socony Mobil Oil Company, Inc. together with the cash received by the Trustee from that company from the sale of a fractional share of its stock, are return derived from principal and, accordingly, distributable to them as "Income" under said Principal and Income Act; and that the Court below should have so concluded.

The further position of the Petitioners is that the first sentence of Section 5(2) of the Principal and Income Act of 1947, providing that "All rights to subscribe to the shares or other securities or obligations of a corporation, accruing on account of the ownership of shares or other securities in such corporation, and the proceeds of any sale of such rights shall be deemed principal", is also unconstitutional as a violation of Article I, Sections 1 and 9 of the Pennsylvania Constitution and the Fourteenth Amendment to the Constitution of the United States in that it also seeks to establish a conclusive statutory presumption which is contrary

to the actual fact and thus deprive the Life Tenants here of their property without due process of law; that all of the amounts of cash received by the Trustee on sales of rights on the corporate capital stock of companies as claimed by the Life Tenants in their Exceptions are likewise *return derived from principal* and, accordingly, distributable to them as "Income" under said Principal and Income Act; and that the Court below should have so concluded.

There can be no doubt of the fact that Pennsylvania has repeatedly determined that the Life Tenant "has an interest or estate in the property constituting the trust fund." *Commonwealth v. Stewart,* 338 Pa. 9 (1940). In that case the Supreme Court said (per Justice Horace Stern):

> "The beneficiary also has rights *in rem,* an actual property interest in the subject matter of the trust, an equitable ownership of the trust *res.*"

In *Harkness Estate,* 283 Pa. 464 (1925), the Supreme Court said that the Life Tenant's interest is one of the "rules of property long established in our own state."

In *Crawford's Estate,* 362 Pa. 458 (1949), the Court said:

> "A gift of an equitable life estate in 'income' is a grant of a vested property interest. The legislature may not thereafter qualify or extinguish it. * * *."

In *Trust of Daniel B. Cummins, Catherwood, Settlor,* 405 Pa. 61 (1961), the Court stated (per Justice B. R. Jones):

> "Certain principles of law are beyond dispute: (1) a gift of an equitable life estate in income or of an estate in remainder does constitute a grant of a vested property right of which the recipients cannot be divested by legislative action; * * * (3) where an interest is declared vested by this Court, such interest cannot be altered or extinguished by the retroactive effect of any statute. That these Life Tenants have a vested property right in the *income* from this trust cannot be questioned. Stated otherwise, if there be *income* arising from the trust, in such *income* the life tenants have such a property right that brooks no legislative interference. The present Act [Principal and Income Act of July 3, 1947, P. L. 1283, 20 P. S. Section 3470] in no wise alters or extinguishes a right to the income arising from the trust."

Turning now to the *first* question set forth under "Questions Presented" (supra. p. 2) a negative answer to this question (which the Court below gave) must rest either upon the ground that the State Legislature has the constitutional power to deny to the Life Tenants of a trust the right to show by competent evidence that dividends on shares of a corporation forming a part of the principal payable in the shares of the corporation itself of the same kind and rank as the shares on which such dividend is paid are *not* principal or upon the theory that a "rule of convenience" in so-called aid of administration of trust estates must take precedence over vested property rights in the Life Tenants despite its thereby depriving such Life Tenants of such vested property rights.

There can be no doubt of the meaning of the language of the first sentence of Section 5(1) of the Principal and Income Act of 1947 that "All dividends on shares of a corporation, forming a part of the principal, which are payable in the shares of the corporation itself of the same kind and rank as the shares on which such dividend is paid shall be deemed principal" and likewise no doubt of the meaning of the first sentence of Section 3(1) of that Act in so far as it excludes from income and thus deems as principal all dividends on corporate shares payable in shares of the corporation itself of the same kind and rank as the shares on which such dividend is paid. Each of such provisions is plainly a *conclusive* statutory presumption that all such dividends *are* principal.

Assuming, *arguendo,* there is no doubt of the power of the legislature to create a *rebuttable* presumption that dividends on shares of a corporation forming a part of the principal which are payable in the shares of the corporation itself of the same kind and rank as the shares on which such dividend is paid shall be deemed principal, it is quite plain that the presumption here created is *not* of that kind. It is made *definitely conclusive—incapable of being overcome by proof of the most positive character—without regard to actualities.* Thus considered the first question here must be answered in the affirmative. *Schlesinger v. Wisconsin,* 270 U. S. 230, and *Hoeper v. Tax Commission,* 284 U.S. 206.

In *Schlesinger* the state statute provided that the value of gifts made by decedent within six years of his death were to be included in his gross estate for purposes of the death tax, as made in contemplation of death.

The presumption was held invalid upon the ground that the statute made it *conclusive without regard to actualities,* while like gifts at other times were not thus treated and that there was no adequate basis for such a distinction.

The *Schlesinger* case has since been applied by this Court in *Heiner v. Donnan,* 285 U. S. 312 (1932), and many times by the lower federal courts, by the Board of Tax Appeals, and by state courts; and none of them seem to have been at any loss to understand the basis of the decision, namely, that a statute which imposes a tax *upon an assumption of fact which the taxpayer is forbidden to controvert* is *so arbitrary and unreasonable* that *it cannot stand under the Fourteenth Amendment. Hall v. White,* 48 F. (2d) 1060; *Guinzburg v. Anderson,* 51 F. (2d) 592; *American Security and Trust Co., et al., Executors,* 24 B.T.A. 334; *State Tax Commission v. Robinson's Executor,* 234 Ky. 415.

In *Hoeper v. Tax Commission, supra,* this Court had before it for consideration a statute of Wisconsin which provided that in computing the amount of income taxes payable by persons residing together as members of a family, the income of the wife should be added to that of the husband and assessed to and payable by him. The Court held that since *in law and in fact* the wife's income was *her separate property,* the state was *without power* to measure his tax in part by the income of his wife, stating (page 215):

> "We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the prop-

> erty or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment. That which is *not in fact the taxpayer's income cannot be made such by calling it income.*" (Italics supplied.)

And, we submit, equally true it is that that which is not *in fact principal* cannot be made such *by calling it principal,* nor can that which is *in fact income* be made *principal* by calling it *such.*

But assuming such *conclusive presumption and the consequent deprivation of the vested property rights of the Life Tenants* are defended upon the theory (as the Court below reasons) that exercising judgment and discretion, the legislature found them necessary in order to facilitate the administration of trust estates, that is to say, "A" may be required to submit to the deprivation of vested property rights forbidden by the Constitution of both the State and the United States if this *seems necessary* in order to enable the State readily to provide a *rule of convenience* to aid in the administration of trust estates, the answer is—Rights guaranteed by the State and Federal Constitutions are not to be so lightly treated; they are superior to this *supposed* necessity. *Claimed* necessity *cannot justify an otherwise unconstitutional deprivation of vested property rights.* The State is forbidden to deny due process of law or the equal protection of the law for any purpose whatsoever. *Schlesinger v. Wisconsin, supra; Heiner v. Donnan, supra.*

The provisions of the Principal and Income Act of 1947 herein complained of, which *deprive* the Life Tenants here of a *vested property right* upon *an assumption*

of fact which they are forbidden to controvert, are so arbitrary and unreasonable that they cannot stand under either Article I, Sections 1 and 9 of the Constitution of Pennsylvania or the due process clause of the Fourteenth Amendment to the Constitution of the United States. The presumption that *excludes consideration of every fact and circumstance tending to show* that dividends on corporate shares, *payable in shares of the corporation itself of the same kind and rank as the shares on which such dividend is paid* are *not* principal *precludes the ascertainment of the truth* as to whether such dividends *actually are* principal.

To *sustain the validity* of this *irrebutable* presumption upon the theory that the legislature deemed it necessary *in order to facilitate the administration of trust estates* to so provide is to say that *Life Tenants may be stripped of their constitutional vested rights in property* in order to make the jobs of trustees and the courts easier, a new and startling doctrine, condemned by its mere statement. Such vested rights are clearly superior to such *supposed* necessity. *Schlesinger, Hoeper* and *Donnan, supra.*

If it be argued that *the conclusive presumption created by the provisions of the statute here involved* is a *rule of substantive law* (as the Court below reasons), and, regarded as such, should be upheld, because the first sentence of Section 5(1) of the Principal and Income Act abolished the so-called "Pennsylvania" rule of apportionment of dividends and the basic significance of intact value and was "considered sound for practical reasons" by the Joint State Government Commission when the Act was passed, it should be remembered that *that rule* created a *prima facie* presumption that an

extraordinary stock dividend *was from earnings and belonged to the Life Tenant* and that *the burden of proving* that the intact value of the shares upon which the extraordinary stock dividend was paid would be diminished and that by reason thereof the extraordinary stock dividend or part of it *belonged to principal,* was on *the trustee or remainderman.* A *rebuttable* presumption clearly is a rule of evidence which has the effect of shifting the burden of proof. It is hard to see how a "statutory" (that is, the Pennsylvania rule of apportionment) *rebuttable* presumption is turned *from a rule of evidence* into *a rule of substantive law* as the result of a later statute making it *conclusive and abolishing the rule.* In *both* cases it is a substitute for proof; in the one open to challenge and disproof, and in the other conclusive. However, whether the latter presumption be treated as a rule of evidence or of substantive law (as the Court below does), it constitutes *an attempt,* by legislative fiat, *to enact into existence a fact* which *in this case does not* and *cannot* be made to exist *in actuality.* It *creates a presumption* which operates *to deny a fair opportunity to rebut it* and violates the due process clause of the Fourteenth Amendment. This Court has so held more than once. *Heiner v. Donnan, supra; Bailey v. Alabama,* 219 U. S. 219, 238, *et seq.; Manley v. Georgia,* 279 U. S. 1, 5-6. In the *Bailey* case the Court said (page 239):

> "It is apparent that a Constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions."

If a legislative body is without power to enact as a rule of evidence a statute denying a Life Tenant the right to prove the facts of his case, certainly the power cannot be made to emerge by putting the enactment *in the guise* of *a rule of substantive law. Heiner v. Donnan, supra.*

It is submitted that the *first* question must be answered in the affirmative and the Court below erred in failing so to do.

Turning next to the *second* question set forth under "Questions Presented" (supra, p. 3), it should first, and clearly, be noted that in each of the four statutory definitions above (p. 4) there is the specific reference *to the fact* that they are *all* "as used in this act," and that they *all mean exactly and only* that which *is stated therein* as to each.

Equally clearly it should be noted that "Principal" *means "any* realty or *personalty"* which *"has been so set aside"* or limited *"by the owner thereof,"* or a person thereto legally empowered, "that *it and any substitutions for it"* are *to remain in trust* perpetually, or are *"eventually to be conveyed, delivered or paid"* to a person, "while *the return therefrom,* or use thereof, or any part of such return or use, is *in the meantime to be taken or received by,* or held for accumulation, *for the same or another* person." "Principal" is thus clearly defined as that which has been so set aside or limited *by the owner* that *"it and any substitutions* for it" are to remain in trust, etc. Since "substitution" means putting one thing *in place* of another and is never synonymous with increase, addition, accretion or words of like import, it is

quite clear that nowhere in the definition of "principal" is there expressed, nor can there be inferred, the slightest statutory intent to increase or add to that which *"the owner"* of the realty or personalty had *"so set aside"* or limited "to remain in trust * * * *eventually to be conveyed,* delivered or paid * * * to a person," while *"the return therefrom,* or use therof" is in the meantime *"to be* taken or *received by,* or held for accumulation for, *the same or another* person." (Italics supplied.)

Likewise equally clear is it that "Income" *means "the return* derived *from principal" as defined* in the Act.

Also equally clear is it that "Tenant" *means* the person to whom *income,* that is, "the return derived from principal", as used in the act, namely, "any realty or personalty" which *has been* so set aside or limited *"by the owner thereof"* (here, the decedent) "and *any substitutions* for it", is *"presently* or *currently payable",* or for whom it is accumulated, or who is entitled to the beneficial use of "the *principal" presently* and for a time prior to *"its"* distribution.

And lastly, but equally clear is it that "Remainderman" *means* the person ultimately entitled to *the principal, as used in the act,* that is, "any realty or personalty" which *has been* so set aside or limited *"by the owner thereof"* and *any substitutions* for it", whether such "Remainderman" be (a) named or designated by the terms of the transaction by which *"the principal* was *established",* or whether (b) determined by operation of law.

Thus, it is seen that all four of such definitions "as used in this act" are consistent with one another.

But, despite the clear-cut definition in Section 1 as to what "Income" *means,* when we turn to Section 3 of the Act we see provisions therein which are plainly inconsistent with and repugnant to Section 1. Here in paragraph (1) thereof "All receipts of money or other property, paid or delivered as rent of realty, or hire of personalty, or dividends on corporate shares, payable *other than in shares of the corporation itself of the same kind and rank as the shares on which such dividend is paid,* or interest on money loaned, or interest on or the rental or use value of property wrongfully withheld or tortiously damaged, or otherwise *in return for the use of principal, shall be deemed income, unless otherwise expressly provided in this act."* Thus, while Section 3 clearly recognizes that "dividends on corporate shares" *shall be deemed income,* "unless otherwise expressly provided in this act", there is nothing in paragraph (1) of Section 3 which specifically, or even inferentially, *limits* the *exclusion from "Income",* as defined and used in the act, of *dividends on corporate shares* "payable * * * in shares of the corporation itself of the same kind and rank as the shares on which such dividend is paid" to those which are *not* "the *return derived from principal"* and thus plainly *includes* in the *exclusion* from income *dividends on corporate shares* "payable in shares of the corporation itself of the same kind and rank as the shares on which such dividend is paid" which represent a "return derived from principal" and thus "Income" as defined in Section 1. Thus, despite the clear, precise and indubitable definition of "Income" in Section 1 of the Act, paragraph (1) of Section 3 of the Act designates *dividends on corporate shares payable in shares of the corporation itself of the same kind and*

rank as the shares on which such dividend is paid as something ***other than*** a "return derived from principal" and to be ***excluded from*** "Income", by an ***irrebutable*** presumption that ***they are*** something other than "Income", namely "Principal". (Italics supplied.)

There is nothing in Section 1 of the Act showing *any exception whatever* to "Income" as *it is therein* defined. It is there stated to be, *as used in this act* "the return derived from principal". The definition of "Income" as therein provided permits neither of *extension* nor *contraction* thereof. Paragraph (1) of Section 3 of the Act in so far as it excludes *as something other than* "Income" *dividends on corporate shares payable in shares of the corporation itself of the same kind and rank as the shares on which such dividend is paid* is clearly inconsistent with and repugnant to the provisions of Section 1 of the Act in its definitions of "Income", *"as used in this act"* and thus void, and the Court below erred in concluding otherwise.

When we turn to Section 5 of the Act, which is headed "Corporate Dividends and Share Rights", we find that the first sentence under paragraph (1) thereof provides that "All dividends on shares of a corporation, forming a part of the principal, *which are payable in the shares of the corporation itself of the same kind and rank as the shares on which such dividends is paid* shall be deemed principal." (Italics supplied.) Here, too, despite the clear, precise and indubitable definition in Section 1 of the Act that "Principal" *as used in this act means* "any realty or personalty which *has been so set aside* or limited *by the owner thereof* * * * that *it and any substitutions for it* are to remain in trust",

(Italics supplied), the first sentence of Section 5 disregards that provision of Section 1 completely when it provides that dividends on corporate shares payable in the shares of the corporation itself of the same kind and rank as the shares on which such dividend is paid "shall be deemed principal", irrespective of whether such dividends are "personalty which *has been so set aside* * * * *by the owner thereof* * * * and *any substitutions* for it" or "the return from principal." Thus, if as a matter of fact such dividends are "the return derived from principal" and thus "Income" under the definition thereof in Section 1 of the Act, the first sentence of Section 5, by a *conclusive* presumption, *changes* them into principal, and thus is clearly repugnant to the definition of "Income" in Section 1 of the Act.

The comment of the Joint State Government Commission respecting the words in Section 5, paragraph (1) of the Act "itself of the same kind and rank as the shares on which such dividend is paid", as being "added in the first sentence to conform to the change in Section 3 (1)", and that "This section abolishes the so-called 'Pennsylvania' rule of apportionment of dividends, and the basic significance of 'intact value', because '*considered* sound *for practical reasons*' ", does not change *the fact* that the first sentence of Section 5, paragraph (1) is inconsistent with and repugnant to the clear, precise and indubitable definition of "Principal" as provided in Section 1 of the Act, which *means* exactly as therein provided—nothing more, nothing less. It merely emphasizes the repugnancy.

Counsel for Petitioners direct the Court's attention to its Opinion in *Heiner v. Donnan, supra,* as complete

support for the positions herein advanced by the Life Tenant and Contingent Remainderman Petitioners. Applying the reasoning of this Court in *Donnan* to the factual situation shown in the record here and to the provisions here involved of Sections 5(1), 3(1) and 1 of the Principal and Income Act of July 3, 1947, it is clear that this reasoning, still the law today, fully supports the several positions of the Petitioners here and shows the error of the Court below, and, accordingly, this Court should have no hesitancy in using it as authority for the granting of the Writ herein sought and the ultimate affirmance of the Petitioners' positions or the questions here presented and the reversal of the Court below. While the *Donnan* case involved the question of the unconstitutionality as a violation of the Fifth Amendment of the Constitution of the United States of a provision of a *Federal* statute which sought to establish a conclusive statutory presumption contrary to the actual fact and *here* we have the question of the unconstitutionality as a violation of the Fourteenth Amendment of the Constitution of the United States of a provision of a *State* statute, this Court most unequivocably stated that the "restraint imposed upon legislation by the due process clauses of the two amendments is the same", prefacing its declaration in these words:

> "The *Schlesinger* case has since been applied many times by the lower Federal courts, by the Board of Tax Appeals, and by state courts; [citing cases] and none of them seem to have been at any loss to understand the basis of the decision, namely, that a statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert, is to arbitrary and unrea-

sonable that it cannot stand under the Fourteenth Amendment.

"Nor is it material that the Fourteenth Amendment was involved in the *Schlesinger* case, instead of the Fifth Amendment, as here. The restraint imposed upon legislation by the due process clauses of the amendments is the same. *Coolidge v. Long,* 282 U.S. 582, 596."

Petitioners accept the decision of the Court below in *Catherwood Trust,* 405 Pa. 61 (1961), in its determination that the Principal and Income Act of 1947 is applicable to trusts created before the date thereof, but they *do not* accept the theory of the so-called "Time Table" of that Decision that the rights of parties litigant are to be determined as of a date upon which some Court passes upon the questions involved in the litigation rather than as of the date upon which *the claimed rights of the parties actually arose.* But the correctness or incorrectness of that "Time Table" determination is of no materiality here, as the questions here presented can be passed upon and Petitioners' positions ultimately affirmed by this Court without any reference whatsoever to "Time Tables". The questions here deal with whether there is *any deprivation of established legal rights in property* and *the enforcement of those rights,* and have nothing whatever to do with any factor of time, statute of limitations or otherwise. Sight should not be lost of the fact that the claim of the Life Tenants here to the dividend shares of stock and amounts of cash involved is *not* based upon their having *any vested right in any particular method of apportionment* (although the Trustee *ad Litem* used his utmost endeavors to convince

the Court below that was their position), which was the foundation upon which the decision of the Court below in *Catherwood* was built, but rather to their having *a vested property right in law* in all the "Income" from the Trust created under the Will of the decedent, said shares of capital stock herein claimed, *under the facts* shown *in the record* below and under *Section 1 of the Principal and Income Act of 1947* being "the return derived from principal" and thus "Income" as used in the Act, and that the provisions of the first sentence of Section 5(1) of the Act under which such dividends *"shall be deemed principal"* and the provisions of the first sentence of Section 3(1) of the Act under which such dividends are *excluded from income,* when applied *to the facts* in this case, are unconstitutional as a violation of Article I, Sections 1 and 9 of the Pennsylvania Constitution and of the Fourteenth Amendment of the Constitution of the United States, in that such provisions seek to establish conclusive statutory presumptions contrary to the actual facts and thus deprive the Life Tenants of their property without due process of law. *We are not dealing with "apportionment" at all.*

It is interesting to note that *the very provisions* of Sections 5(1) and 3(1) of the Principal and Income Act here under attack were by the Act of the General Assembly of the Commonwealth of Pennsylvania of August 1, 1963, No. 233, *stricken from the Act of 1947,* effective September 30, 1963. The Bill on which this 1963 Act was based was introduced in the General Assembly under date of April 17, 1963, as House Bill No. 857. That Bill passed the House on May 28, 1963, by a vote of 201 to 0, *without any discussion,* so far as Counsel for Petitioners

have been able to ascertain, on the floor of the House, or later in the Senate, during passage. Was the attack then *for the first time* being made on the constitutionality of these very provisions by the Petitioners brought home to the legislature and in its wisdom that body was by this Bill endeavoring to correct the unconstitutional provisions it had placed in the Act sixteen years before? We wonder!

Turning to the *third* of the Questions Presented (supra, p. 3), Petitioners' position on the unconstitutionality of the above provision of Section 5(2) of the Principal and Income Act (p. 5) is exactly the same as the positions taken and argued under points 1 and 2 above.

All of the amounts of *cash* involved in the Petitioners' Exceptions respecting moneys derived by the Trustee *from sales of rights* on the corporate capital stock of the several corporations hereinabove referred to, the Trustee under the Will in its Petition for Distribution filed in June, 1961, *declared and admitted belonged to the Life Tenants.* Such declarations and admissions were withdrawn by the Trustee in its Supplemental Petition for Distribution filed after the decision of the Court below in *Catherwood, supra.* As hereinabove clearly shown by Petitioners, the decision of the Court below does not control the constitutional questions here presented.

CONCLUSION

It is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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December 1964.

APPENDIX

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

In Re Estate of FLORENCE TACK NORVELL, Deceased Appeals of: FRANK M. TACK and LOIS V. TACK, Now THOMPSON, Life Tenants, Appellants at Nos. 88 and 89, and HARRY S. TACK, A Contingent Remainderman, Appellant at No. 90.	Nos. 88, 89, 90 March Term, 1964 Appeals from Decree of Orphans' Court of Allegheny County at No. 4403-A5 of 1940 and dated August 26, 1963.

Opinion of the Court

(Filed October 7, 1964)

ROBERTS, J.

Florence Tack Norvell died August 24, 1921. Her will, dated August 9, 1919, created a trust out of which the present controversy arises. Appellants are life tenants under the trust and are entitled by its provisions to receive all of the income. The trust also establishes alternative remainders over in named and unascertained persons.[1]

On March 4, 1960, the trustees filed their fifth account. The petition for distribution, filed June 1, 1960, requested the court to approve distribution to the life

1. The life tenants' father is one of the contingent remaindermen and joins them in this appeal.

tenants of the proceeds from the sales of stock subscription rights and of certain shares of stock received by the trustees as stock dividends.[2] Following our decision in *Catherwood Trust,* 405 Pa. 61, 173 A.2d 86 (filed July 26, 1961), the trustees withdrew the suggested schedule of distribution. On December 20, 1961, the trustees filed a supplemental petition for distribution and took the position that, in view of *Catherwood,* "the entire apportionment matters referred to in the Petition for Distribution need not be presented."

The Orphans' Court of Allegheny County, by decree of April 29, 1963, approved the distribution to principal of cash from the sale of rights and the shares of stock received as stock dividends. This allocation was made under the Principal and Income Act of July 3, 1947, P.L. 1283, which *Catherwood Trust,* supra, held constitutionally applicable to trusts created prior to the effective date of the Act.[3]

Specifically, this appeal challenges the constitutional validity of Sections 3(1), 5(1) and 5(2) of the Act. Section 3(1) provides: "All . . . dividends on corporate

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2. The sales of rights covered the period 1952-58. All stock dividends were well in excess of six percent of the outstanding shares of that class.

3. Since the trust was created prior to the enactment of the Principal and Income Act, and since all the stock dividends and all subscription rights sales occurred after the enactment of the Principal and Income Act, the statutory rules classifying such receipts as principal was held to govern this transaction. Since the stock dividends here involved all exceeded this Court's "stock dividend of 6% or less" rule in *Pew Trust,* 411 Pa. 96, 191 A.2d 399 (1963), that rule does not apply.

shares, payable other than in shares of the corporation itself of the same kind and rank as the shares on which such dividend is paid, . . . shall be deemed income, unless otherwise expressly provided in this act."[4]

Prior to September 30, 1963, Section 5(1) directed: "All dividends on shares of a corporation, forming a part of the principal, which are payable in the shares of the corporation itself of the same kind and rank as the shares on which such dividend is paid shall be deemed principal. . . ."[5]

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4. Of course, the settlor may set out his or her own definition of what is meant by "income," in which case Section 2 of the Act provides that the settlor's meaning shall prevail and the statutory definitions do not apply. P.L. 1283, § 2, 20 P.S. § 3470.2.

Chief Justice Bell noted in *Pew Trust,* supra note 3, that "the object and purpose of this proviso was undoubtedly to preserve to every settlor and every testator his basic centuries old right to determine to whom his property should go, and how—whether outright or conditionally, or in trust, i.e., what he wanted to go to his life tenant as income and what to his remainderman as principal." 411 Pa. at 105-06, 191 A.2d at 405.

5. Subsequent to our decision in *Pew Trust,* supra note 3, (filed May 29, 1963), holding that stock dividends of "6% or less" of the outstanding shares of the same class on the record date are applicable to income, this sentence was amended by Act of August 1, 1963, P.L. 442, § 1, 20 P.S. § 3470.5(1), effective September 30, 1963, and provides:

> "Corporate distributions made to a trustee in the shares of the distributing corporation, however described or designated by the distributing corporation, shall be deemed principal but if the number of shares of any class distributed to shareholders of such class is six percent (6%) or less of the number

Section 5(2) reads: "All rights to subscribe to the shares or other securities or obligations of a corporation, accruing on account of the ownership of shares or other securities in such corporation, and the proceeds of any sale of such rights shall be deemed principal. . . ."

The alleged infirmity is one of deprivation of property without due process of law. It is vigorously contended that the Principal and Income Act, as applied to this trust created years prior to the effective date of the Act, deprives the life tenants of their property without due process, in violation of Article I, Sections 1 and 9 of the Pennsylvania Constitution and the Fourteenth Amendment to the Constitution of the United States.

Appellants urge that, as life tenants, they are entitled to all the return derived from the principal of the trust and that the first sentence of Section 5(1), directing that "all dividends on shares . . . shall be deemed principal," establishes a conclusive statutory presumption contrary to actual fact and violates the constitutional due process provisions. Substantially the same

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of shares of that class outstanding on the record date for such distribution, the shares so distributed shall be deemed income."

Both our ruling in *Pew* and the provisions of the 1963 amendment declare that only stock dividends of 6% or less are income. Each such dividend is considered separately without reference to the trust or corporate year. In contrast, the New York statute allocates to income the first 6% of larger dividends and limits the total receivable income of this type to 6% in any particular year. See N.Y. Pers. Prop. Law § 17-a(3) (effective June 1, 1965); Second Report of the New York Commission on the Modernization, Revision and Simplification of the law of Estates, 322 (1963).

attack is made on the first sentence of Section 3(1) to the extent that it excludes from income stock dividends (of the same kind and rank as the shares on which paid).

Appellants assert, and we agree, that the contentions presently advanced were not raised or directly settled in *Catherwood*. We do feel, however, that the implications of that decision are unmistakably pertinent and persuasive here.

In essence, appellants argue that the Legislature has improperly and conclusively defined principal so as to preclude the life tenants from proving that the stock dividends here are "in fact" income. This position appears based on the premise that income has a distinct, fiscal meaning (presumably, that accorded the term under the Pennsylvania Rule of Apportionment prior to the Principal and Income Act). And appellants insist that the statute may not, by means of an irrebuttable presumption, constitutionally preclude them from establishing that the distributions in controversy fall within the meaning they seek to give income.

Appellants place their heaviest reliance on *Heiner v. Donnan*, 285 U.S. 312, 52 S.Ct. 358 (1932), but that reliance is unfounded, especially since *Heiner* dealt with a statute establishing, in effect, a rule of evidence. There the statute provided that gifts in excess of $5,000 made within two years of the donor's death were to be deemed as having been made "in contemplation of death." No opportunity was afforded to prove that a gift within the two year period was not so made. Accordingly, the value of the gift was taxable under other provisions of the taxing statute.

It is important to note that the amount of the gift was not taxable in *Heiner* unless made in contemplation of death, and that "contemplation of death" had a meaning which Congress did not seek to change. The Supreme Court held the statute invalid as "an attempt, by legislative fiat, to enact into existence a *fact* which here does not, *and cannot be made to,* exist in actuality. . . ." (Emphasis supplied.) 285 U.S. at 329, 52 S.Ct. at 362. Moreover, the Supreme Court made it quite clear that the statute was not intended to operate as a change in the substantive law, i.e., that there was no congressional intention to tax gifts not made in contemplation of death. 285 U.S. at 328-30, 52 S.Ct. at 362-63.

It seems clear to us that the Principal and Income Act does not establish, as appellant contends, a rule of evidence, i.e., a presumption contrary to the actual facts. What the statute expressly does is to set forth a substantive rule of law defining income and principal. See 4 Wigmore §§ 1353-54 (3d ed. 1940); 9 Wigmore, *op. cit. supra,* § 2492; *cf. United States v. Carlisle,* 234 F.2d 196, 199 (5th Cir.), *cert. denied,* 352 U.S. 841, 77 S.Ct. 63 (1956); *Bowers v. United States,* 226 F.2d 424, 428 (5th Cir. 1955); *United States v. Jones,* 176 F.2d 278, 288 (9th Cir. 1949); *City of New Port Richey v. Fidelity & Deposit Co.,* 105 F.2d 348, 351 (5th Cir. 1939); *Commonwealth v. Brue,* 284 Pa. 294, 296, 131 Atl. 367, 368 (1925).

In *City of New Port Richey v. Fidelity & Deposit Co.,* supra, an argument similar to that presently advanced was rejected. The court said:

> "We recognize that the legislature cannot make certain facts conclusive proof of another ultimate fact when there is no logical connection or prob-

ability in experience to connect them. But the real legislative intent may not be to make a rule of evidence, but a rule of substantive law, *and if the legislature may constitutionally do the latter,* the form of the words used will not defeat the intent." (Emphasis supplied.) 105 F.2d at 351.

It is clear that the Legislature, by the 1947 Act, intended to, and did, change the substantive law by declaring that certain kinds and classes of stock dividends constitute principal. Thus, a new definition of income was statutorily established.[6] Here, unlike *Heiner,* the statute enacts into existence, not a fact, but a definition of a term theretofore subject to judicial determination.

We are therefore led to the question whether the Legislature possesses constitutional authority to define income. This determination, in turn, depends on whether income, as used in the statute, enjoys such a fixed definitional status that it may not be legislatively disturbed. In *Catherwood* we attributed to trust income no such undisturbable status.

We held in *Catherwood* that life tenants have no vested interest in a court-made rule of apportionment. 405 Pa. at 72-73, 77 173 A.2d at 91, 93. Although the life beneficiaries there (as the life tenants here) enjoyed a vested right to the income of the trust, no vested right exists in the functional, operational or definitional methods of ascertaining from time to time what consti-

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6. "This section [5(1)] abolishes the so-called 'Pennsylvania' rule of apportionment of dividends, and the basic significance of 'intact value.'" 20 P.S. §3470.5 (1), Commissioners Comment.

tutes such income. Due process does not mandate that prior decisions or rules remain effective and controlling forever. Thus, it is settled that there is no vested interest in a definition or method of ascertaining income. This conclusion is supported by compelling reasoning and the clear weight of authority. E.g., *In re Gardner's Trust,* 266 Minn. 127, 123 N.W.2d 69 (1963); *In Matter of Trust of Arens,* 41 N.J. 364, 197 A.2d 1 (1964); *In re Will of Allis,* 6 Wis. 2d 1, 94 N.W.2d 226 (1959); Bogert, Trusts and Trustees § 847, at 505-06 (2d ed. 1962); Bogert, "Uniform Principal and Income Act Revised," 101 Trusts & Estates 787, 788 (1962); King, "Uniform Principal and Income Act, § 5: Constitutionality of Its Retroactive Applications," 1960 Wash. U.L.Q. 339; Niles, "Fosdick, Cunningham and Chaos," 98 Trusts & Estates 924, 927-28 (1959); Scott, "Principal or Income?" 100 Trusts & Estates 108, 250-51 (1961); Second Report of the New York Commission on the Modernization, Revision and Simplification of the Law of Estates, 272 n.352, 275 (1963); 112 U. Pa. L. Rev. 290, 292 n.14 (1963) and other authority cited therein; see *Farmers Bank & Capital Trust Co. v. Hulette,* 293 S.W.2d 458 (Ky. 1956); *Langdell v. Dodge,* 100 N.H. 118, 122 A.2d 529 (1956); *cf. Domerest v. City Bank Farmers Trust Co.,* 321 U.S. 36, 64 S.Ct. 384 (1944).

We have no hesitancy in concluding that the Legislature has the power to define income.[7] In the light of

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7. It is common experience that 'income" is a term which is, and always has been, defined differently for various purposes by governmental agencies, regulatory bodies, taxing authorities, legislators, accountants, securities analysts, bankers, financial writers, lawyers and laymen.

the complexity of current corporate finance, the definition of income is a function which the Legislature is well suited to perform. "In the area of apportionment of stock distribution between income and corpus beneficiaries, the elements of fairness, practicality and changing conditions dictate that freedom be given to lawmaking bodies to promulgate rules applicable to existing trusts." King, supra, at 357. See also Burke, J., in *Matter of Fosdick*, 4 N.Y.2d 646, 655, 176 N.Y.S.2d 966, 973, 152 N.E.2d 228, 233 (1958): "[T]hat function [altering definitions in this area] is for the Legislature alone."

In the use of its definitional powers, of course, the Legislature may not act arbitrarily. *Nebbia v. New York*, 291 U.S. 502, 537, 54 S.Ct. 505, 516 (1934); *Maurer v. Boardman*, 336 Pa. 17, 25, 7 A.2d 466, 473 (1939), *aff'd*, 309 U.S. 598, 60 S.Ct. 726 (1940). In the face of the generally known and experienced difficulty, complexity and uncertainty under the prior rule of apportionment in ascertaining the "intact value" of designated shares of stock at a given time, the Legislature acted to provide for a fairer, more orderly and more uniform apportionment between income and principal.[8] The particular definitions which the Legislature adopted by the 1947 Act represent what that body determined to be a pragmatic necessity for a current, definite, more understandable and more workable rule of fair apportionment. Such action by the Legislature, providing for remedial and

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8. The difficulties are aggravated by current methods of corporate financing, changes in capital and share structure and varying procedures for corporate distributions.

commercially useable standards, is an entirely desirable legislative function. Legislation based on such broad public policy and realistic considerations is entirely proper and manifestly reasonable. The absence of arbitrariness is further attested to by the fact that the 1947 Act, in effect, basically adopts the long-established and well-regarded "Massachusetts Rule of Apportionment" embracing substantially the same definitions.[9] The rationale behind that rule is, in our view, a reasonable one, based on substantial considerations. That rule has received approval (at one time or another) in a great many jurisdictions, either by judicial decision[10] or by legisla-

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9. The Massachusetts Rule formed the basis for Section 5 of the Uniform Principal and Income Act. 112 U. of Pa. L. Rev. 290, 292 n.18 (1963); Second Report of the New York Commission on the Modernization, Revision and Simplification of Estates 239 (1963). In turn, the Uniform Act was adopted by the 1947 Pennsylvania Act.

10. See *First Nat'l Bank v. Hill*, 241 Ala. 606, 4 So.2d 170 (1941); *Spooner v. Phillips*, 62 Conn. 62, 24 Atl. 524 (1892); *McLane v. Cropper*, 5 App. D.C. 276 (1895); *DeKoven v. Alsop*, 205 Ill. 309, 68 N.E. 930 (1903); *Powell v. Madison Safe Deposit & Trust Co.*, 208 Ind. 432, 196 N.E. 324 (1935); *Bowles v. Stilley's Ex'r*, 267 S.W.2d 707 (Ky. 1954); *Thatcher v. Thatcher*, 117 Me. 331, 104 Atl. 515 (1918); *Minot v. Paine*, 99 Mass. 101 (1868); *In re Joy's Estate*, 247 Mich. 418, 225 N.W. 878 (1929); *Hayes v. St. Louis Trust Co.*, 317 Mo. 1028, 298 S.W. 91 (1927); *United States Trust Co. v. Corin*, 121 Neb. 427, 237 N.W. 284 (1931); *Langdell v. Dodge*, 100 N.H. 118, 122 A.2d 529 (1956); *Humphrey v. Lang*, 169 N.C. 601, 86 S.E. 526 (1915); *Lamb v. Lehmann*, 110 Ohio St. 59, 143 N.E. 276 (1924); *Rhode Island Trust Co. v. Tucker*, 51 R.I. 507, 155 Atl. 661 (1931); *Kirby v. Kirby*, 68 S.D. 612, 5 N.W.2d 405 (1942); *Bergin v. Bergin*, 159 Tex. 83, 315 S.W.2d 943 (1958); *Kaufman v.*

tive action.[11] Such overwhelming support for the rationale on which our statute is based confirms our view of its reasonableness.

Appellants make a further argument. They suggest Sections 3(1) and 5(1) of the Act are void because they are repugnant to the definitions in Section 1 of the Act, especially the definitions of "principal" and "income." There "principal" is defined as "any . . . personalty which has been so set aside by the owner thereof . . . that it and any substitutions for it are eventually to be conveyed, delivered or paid to a person, while the return therefrom . . . is in the meantime to be taken or received by . . . another person." "Income" is defined as "the return derived from principal." Appellants urge that the contested stock dividends are not a "substitution" for the assets of principal, but rather are a "return" on principal. Therefore, their argument continues, Sections 3(1) and 5(1), by allotting such stock to principal rather

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Charlottesville Woolen Mills, 93 Va. 673, 25 S.E. 1003 (1896); *Security Trust Co. v. Rammelsburg*, 82 W.Va. 701, 97 S.E. 122 (1918).

The Supreme Court of the United States has made approving use of the rule. *Gibbons v. Mahon*, 136 U.S. 549, 10 S.Ct. 1057 (1890).

The present Restatement of Trusts also adopts the Massachusetts Rule. Restatement (Second), Trusts § 236(b) (1959).

See also Flickinger, "A Trustee's Nightmare: Allocation of Stock Dividends Between Income and Principal," 43 B.U.L. Rev. 199, 207 (1963); Report of the New York Commission, supra note 9, at 238-39.

11. See Flickinger, supra note 10, at 248; Report of the New York Commission, supra note 9, at 239.

than to income, are repugnant to Section 1 and consequently void.

This reasoning assumes that the words "substitutions" and "income" have meanings unrelated to what follows in the remainder of the Act. We see no inconsistency between the sections. The words "substitutions" in the definition of principal and "return" in the definition of income are, in themselves, not self-contained definitions; they are merely descriptive. What is a "substitution" or a "return" is defined by later sections, including Sections 3(1) and 5(1).

Failing to find the constitutional deficiencies which appellants assert, or any similar or other infirmity, error or defect, the decree below must be affirmed.

Decree affirmed. Each party to pay own costs.

MR. CHIEF JUSTICE BELL files a dissenting opinion.

Dissenting Opinion

FILED: October 7, 1964

BELL, C. J.

The majority Opinion states that the constitutional question herein raised was not decided in *Catherwood Trust,* 405 Pa. 61, 173 A.2d 86, namely, whether the application of the Act of July 3, 1947, to trusts created prior to the effective date of the Act violated Article I, Sections 1 and 9, of the Constitution of Pennsylvania, and the Fourteenth Amendment to the United States Constitution?

Prior to the Act of (1945) 1947, a life tenant had *a vested property right* in certain stock dividends and in certain corporate distributions, and it was repeatedly held by this Court that any retroactive application of the Acts to a trust created prior thereto would violate the Constitution of Pennsylvania and the Constitution of the United States.

Cunningham Estate, 395 Pa. 1, 149 A.2d 72; *Warden Trust,* 382 Pa. 311, 105 A.2d 353; *Pew Trust,* 362 Pa. 468, 67 A.2d 129; *Crawford Estate,* 362 Pa. 458, 67 A.2d 124; *Steele Estate,* 377 Pa. 250, 103 A.2d 409, and *Jones Estate,* 377 Pa. 473, 115 A.2d 159, directly and specifically hold that the application of the Act of 1947 to trusts created prior thereto, would be Unconstitutional. With these decisions, I strongly agree; my views are set forth at length in my Concurring and Dissenting Opinion in *Catherwood Trust,* 405 Pa. 78, 173 A.2d 94.

For these reasons and under and because of these wise decisions, I dissent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. 798

FRANK M. TACK and LOIS V. TACK, Now THOMPSON, Life Tenants, and HARRY S. TACK, A Contingent Remainderman, Petitioners

v.

MELLON NATIONAL BANK AND TRUST COMPANY, Trustee of the Estate of FLORENCE TACK NORVELL, Deceased, and ROBERT B. McKINLEY, Guardian and Trustee Ad Litem, Sur Account Entitled Fifth Account of said Trustee, Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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INDEX TO BRIEF

PAGE

I. The Petition Should Be Dismissed for Lack of Jurisdiction 1

A. There is no federal or constitutional issue involved 1

B. There are no conflicting decisions to be reconciled by your Honorable Court 2

C. The matter is one of state law on which the state court interpretation is final 3

II. The Petition Should Be Dismissed for Lack of Merit 3

A. The State Court decision was in conformity with pronouncements of your Honorable Court and the rule in force in a majority of states 3

B. Changes found necessary in future apportionment of income and principal under existing trusts are properly a matter for state legislature and state court determination, as your Honorable Court held in Demorest v. City Bank Co., 321 U.S. 36, 64 U.S. 384 10

C. The three decisions of Your Honorable Court relied on by Petitioners are clearly distinguishable 15

Conclusion 19

TABLE OF CITATIONS

CASES — PAGE

Catherwood Trust, 405 Pa. 61 (1961) ..... 1, 9, 10, ... 11,17, 18

Demorest v. City Bank Co., 321 U.S. 36, 64 S. Ct. 384 ..... 10, 11

Eisner v. Macomber, 252 U.S. 189, 40 S. Ct. 109 ... 4

Equitable Trust Co. v. Prentice, 250 N.Y. 1, 164 N.E. 723 6

Heiner v. Donnan, 285 U.S. 312, 52 S. Ct. 358 15

Hoeper v. Tax Commission, 284 U.S. 206, 52 S. Ct. 120 ..... 15, 16

In Re Bank of New York & Fifth Avenue Bank, 105 N.Y.S. 2d 211 7

Matter of Ryan's Estate, 294 N.Y. 85, 60 N.E. 2d 817 5

People ex rel. Clark v. Gilchrist, 243 N.Y. 173, 153 N.E. 39 ..... 5, 6

Schlesinger v Wisconsin, 270 U.S. 230, 46 S. Ct. 160 15

Towne v. Eisner, 245 U.S. 418, 38 S. Ct. 158 3

TABLE OF STATUTES

Principal and Income Act of 1947 (Pa.) 1, 2, 3, 15

Personal Property Laws (N.Y.) (Cons. Laws, ch. 41, sec. 17-a) 5, 11

Uniform Principal and Income Act (by National Conference of Commissioners on Uniform State Laws 9, 10

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. The Petition Should Be Dismissed for Lack of Jurisdiction.

A. *There is no federal or constitutional issue involved.*

Petitioners state, on page 28 of their printed Petition for Writ of Certiorari, that they accept the decision of the Pennsylvania Supreme Court in Catherwood Trust, 405 Pa. 61 (1961) that the 1947 Principal and Income Act here involved is applicable to trusts created before the date thereof, but they "do not accept the theory of the so-called 'time Table' of that decision that the rights of parties litigant are to be determined as of a

date upon which some Court passes upon the questions involved in the litigation rather than as of the date upon which the claimed rights of the parties actually arose." Petitioners do not make any statement as to when their claimed rights are deemed to have arisen. If their rights are deemed to be vested when the testamentary trust took effect upon the testator's death, and if they concede that the 1947 Principal and Income Act is applicable thereto, then there is no constitutional issue here presented. If their rights are deemed to have arisen when the dividends here involved were declared or earned, which admittedly was long after the 1947 Act went into effect, then there is no constitutional issue here presented. Therefore, if the only objection of the Petitioners to the Catherwood decision (which the Pennsylvania Supreme Court followed and applied in this case) is the "Time Table" thereof, and not the constitutionality of its holding on the issue of retroactivity, the Petitioners have not presented any constitutional issue for determination by your Honorable Court.

B. *There are no conflicting decisions to be reconciled by your Honorable Court.*

The Pennsylvania Supreme Court has decided the matter in conformity with the clear pronouncements of your Honorable Court and the majority rule now in force, either by judicial decision or legislation, in most states, as more fully appears in part II hereof.

C. *The matter is one of state law on which the state court interpretation is final.*

The Pennsylvania legislature concededly had jurisdiction to decide what is or is not principal; sections 3 and 5 of the Principal and Income Act represent a proper exercise of that jurisdiction and the interpretation thereof is strictly a matter of state concern.

II. The Petition Should Be Dismissed for Lack of Merit.

A. *The State Court decision was in conformity with pronouncements of your Honorable Court and the rule in force in a majority of states.*

The Pennsylvania Legislature, in enacting Sections 3 and 5 of the 1947 Principal and Income Act, created no mere presumption but made a definite pronouncement and classification as to what dividends shall constitute principal. There is no question but that it was within the jurisdiction of the Pennsylvania Legislature to make such a determination; in the exercise of its wisdom it provided that stock dividends of the same kind and rank as that on which issued shall be deemed principal. This determination rested on the very nature and characteristics of such dividends as in fact being principal, and was in complete accord with the pronouncements of your Honorable Court. In *Towne v. Eisner,* 245 U.S. 418, 38 S.Ct. 158 your Honorable Court concluded that the stock dividend in question could not be reached by the Income Tax Act even though Congress had expressly declared it to be taxable as income. Your Court reasoned as follows:

> "Notwithstanding the thoughtful discussion that the case received below *we cannot doubt that the dividend was capital as well for the purposes of the Income Tax Law as for distribution between tenant for life and remaindermen.* What was said by this court upon the latter question is equally true for the former. 'A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished, and their interests are not increased * * *' The proportional interest of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of the new ones" (emphasis supplied).

That decision was followed and applied by your Honorable Court in *Eisner v. Macomber,* 252 U.S. 189, 40 S.Ct. 109, wherein your Court again concluded, after another exhaustive study of the nature of stock dividends, that such dividends could not be taxed by Congress as "income" either under the Sixteenth Amendment "or otherwise". It is respectfully submitted, therefore, that if such dividend cannot be considered income for tax purposes, there is no reason for holding it to be income for distribution purposes, *the trust agreement not providing otherwise.* Thus, the Petitioners cannot successfully contend that they have been deprived of property without due process of law because what they in fact claim as income was properly determined to be principal.

In *People ex rel. Clark v. Gilchrist*, 243 N.Y. 173, 153 N.E. 39, Justice Cardozo stated that shares issued as a dividend "in their intrinsic nature are merely readjustments of the corpus" and "while in the hands of the fiduciary, were not gains or income 'of the trust' " and could not become income merely by distribution to the life tenant under the express terms of the trust.

In 1926 New York adopted as part of its Personal Property Law (Cons. Laws, ch. 41, sec. 17-a) a provision similar to sections 3 and 5 of the Principal and Income Act here involved. In *Matter of Ryan's Estate*, 294 N.Y. 85, 60 N.E. 2d 817, the lower court held that the stock dividend was allocable to income because it was an ordinary stock dividend paid out of corporate earnings derived during the period of the trust. On appeal, the Court of Appeals reversed, stating that by said Section 17-a the legislature provided that "*any* dividend which shall be payable in the stock of the corporation . . . shall be principal. . ." and therefore the court was not to determine whether the dividend in question was ordinary or extraordinary. The Court there emphasized that "In plain language the Legislature provided that 'any dividend which shall be payable in the stock of the corporation . . . shall be principal . . .' "

Justice Cardozo commented on said Section 17-a in his decision in *People ex rel. Clark v. Gilchrist*, supra, as follows:

> "The same Legislature that excluded stock dividends from the category of income for the purpose of taxation, went farther and amended the Personal Property Law (Cons. Laws, ch. 41) by enacting that under any will or deed hereafter made, unless

> otherwise therein provided, stock dividends shall be principal and not income of a trust * * * If stock dividends are still taxable as income to the extent that they belong to life tenant or beneficiary, the State may contest the propriety of the apportionment between life estate and remainder. So to read the statute is to misread it. In effect, the Legislature has said that stock dividends in their intrinsic nature are merely readjustments of the corpus."

And in *Equitable Trust Co. v. Prentice,* 250 N.Y. 1, 164 N.E. 723, Justice Cardozo again had occasion to note the nature and effect of a stock dividend as part of principal not only for tax purposes but also "for the purpose of another statute", to-wit, section 17-a of the New York Personal Property Law above discussed.

> "*Stock dividends in the true sense—i.e., dividends capitalizing surplus, as distinguished from those payable in the stock of a subsidiary* (People *ex rel.* Clark v. Gilchrist, 243 N.Y. 173, 178, 153 N. E. 39; U(nited) S(tates) v. Phellis, 254 U. S. 156, 42 S. Ct. 63, 66 L. Ed. 180—*have predominantly the quality of an increment to principal, though at times, in furtherance of intention, they have been classified as income.* When a dividend is paid in cash, the ownership of the corporate assets is changed; the Company owns less, and the shareholder owns more, or something essentially different, though its value be no greater. Upon the distribution of a stock dividend, ownership of the assets is precisely as it was. 'A stock dividend does not distribute property, but simply dilutes the shares as they existed before.' Note the similarity in reasoning with the decision

of your Honorable Court in Flaccus Estate, *supra.* Williams v. Western Union Tel. Co., 93 N. Y. 162, 189. Whatever gain results to the shareholder from the division of his certificates is indirect and incidental, not extracted from the assets like the recurrent yield of an investment. Lynch v. Hornby, *supra,* 247 U. S. 339, p(age) 344 (38 S. Ct. 543) (62 L. Ed. 1149); T. R. Powell, 'Income from Corporate Dividends,' 35 Harv. L. Rev. 363, 366, 367; Warren, 'Stock Dividends,' 33 Harv. L. Rev. 885. *The law is now established, in this court as elsewhere, that for the purpose of taxation such a dividend is capital, whether the shareholder takes it in his own right or for the benefit of another.* People *ex rel.* Clark v. Gilchrist, *supra. There should be cogent evidence of intention to justify us in holding that for the purpose of another statute it is to be ranked as something else."* (Emphasis supplied).

Sections 3 and 5 of the 1947 Principal and Income Act here at issue embody the Massachusetts rule which has long been in effect in other states. The progress and steady increase in the adoption of the Massachusetts rule was clearly pointed out in *In re Bank of New York & Fifth Avenue Bank,* 105 N.Y.S. 2d 211:

"The trust instrument here, in its form, structure and substance, indicates that it was drawn by an experienced expert draftsman. That it was written with Section 17-A in mind is clearly indicated by the provisions of Article Fifth. *The change effected by the enactment of that Section is so well stated In Re Strong's Will, 198 Misc. 7, 96 N. Y. S. 2d 75, 83, by Surrogate Witmer, that we adopt and quote it*

here. 'In the Osborne case the court noted the difference between the Massachusetts Rule and the Pennsylvania Rule with reference to stock dividends, and substantially adopted the Pennsylvania Rule.' As above noted, in 1926 our Legislature enacted section 17-A, as amended, of the Personal Property Law, thus establishing the Massachusetts Rule in New York as to trusts created thereafter. In 1935 the American Law Institute adopted the Pennsylvania Rule in its Restatement of the law of Trusts, Section 236. In 1948, however, the Institute reconsidered this question, found that the trend among the states, by decision and statute, is now to follow the Massachusetts Rule, and that the latter is in general more satisfactory, and amended section 236 of the Restatement of the Law of Trusts to accord with the Massachusetts Rule. Restatement of the Law, 1948, Supplement, Trusts, Section 236; and see Matter of Heinrich's Will, 195 Misc. 803, 811, 90 N. Y. S. 2d, 875, 883. Moreover, ever since the decision in the Osborne case our courts have recognized the difficulties of application of the principle therein adopted, and have figuratively sighed with relief at the realization that trusts created since the statute of 1926 are not governed by said decision. People ex rel. Clark v. Gilchrist, 243 N. Y. 173, 182, 153 N. E. 39, 41; Matter of Hagen('s Will), 262 N. Y. 301, 305, 186 N. E. 792, 793, supra. From this review of the progress of the law with respect to stock dividends it is evident that the attitude of our Legislature, of our courts and of the American Law Institute neither calls for nor permits an extension of the principle of the Osborne Case." (emphasis supplied).

Thus, it can be seen that the rule allocating to principal dividends of the same kind and rank as that on which issued is not a new rule arbitrarily made without logical basis. It is a rule based on the true nature and effect of such a stock dividend, as reasoned, studied and held by your Honorable Court. It is the Massachusetts rule adopted and followed by many states (See decision of the Pennsylvania Supreme Court, page 41 of Appendix to printed Petition for Writ of Certiorari). As stated in *Catherwood Trust,* 405 Pa. 61, as early as 1927 the rule was then followed "by Connecticut, Georgia, Illincis, Maine, North Carolina, Rhode Island, West Virginia, and the U. S. Supreme Court. See 24 A.L.R. 29. It was also the English rule."

It is the rule adopted and followed by the American Law Institute in its Restatement of the Law of Trusts; It is the rule adopted by the National Conference of Commissioners on Uniform State Laws in the drafting of the Uniform Principal and Income Act, who, in their Prefatory Note to the Act stated "the majority of the large commercial states have already favored the former and more convenient rule (the Massachusetts rule)...".

B. *Changes found necessary in future apportionment of income and principal under existing trusts are properly a matter for state legislature and state court determination, as your Honorable Court held in Demorest v. City Bank Co., 321 U.S. 36, 64 U.S. 384.*

The prior Pennsylvania rule of apportionment was abandoned not for the mere sake of expediency, but because that rule was so fraught with complexities that it was almost impossible to secure an equitable determination of what was or was not principal or income. As stated by the drafters of the Uniform Principal and Income Act:

> "Experience has shown that, however praiseworthy the intent, the latter Pennsylvania Rule is unworkable, since neither trustee nor the Court has the means to value the corporate assets in such way as to secure the fair adjustment aimed at."

In *Catherwood Trust,* 405 Pa. 61, the Pennsylvania Supreme Court noted at length the complexities of the Pennsylvania rule of apportionment especially when applied to modern day corporate financing and record-keeping, the Court there stating:

> "* * * In recent years the ingenuity of corporate management, seeking to achieve various ends such as broadening or enhancing the market for its stock, effect tax savings, etc., has produced a complexity of corporate transactions which involve the transfer on corporate books of earnings, earned surplus, etc., from one account to another. Earnings, under

modern corporate practice, no longer retain the simplicity of meaning of the earnings considered by this Court in Earp's Appeal, *supra,* and other decisions!"

Your Honorable Court in *Demorest v. City Bank Co.,* 321 U.S. 36, 64 S. Ct. 384, upheld changes by the New York State Legislature in the apportionment of proceeds from salvage operations of mortgaged properties acquired by a trustee. The remaindermen under existing trusts there claimed that the new statutory rule of apportionment under 17-c of the New York Personal Property Law, being less favorable to them than the rules theretofore existing, was violative of the Fourteenth Amendment because it deprived them of rights secured to them under the prior rule of apportionment. Your Honorable Court did not agree with that contention but affirmed the constitutionality of such retroactive change in the apportionment of the proceeds from salvage operations. The New York legislature in enacting said section 17-c expressly stated that its purpose was "the simplification of the rules of procedure in mortgage salvage operations and the elimination of present complications which work to the disadvantage of the life tenant, . . . Such fixed right is granted in lieu of the discretion now given to the trustee to pay net income or any part thereof to the life tenant."

Thus, the New York legislature substituted a definite rule of apportionment for an apportionment within the Trustee's discretion. It thus took away from the beneficiaries the right to question the propriety of the distribution, just as the legislature did in this case. Your Honorable Court upheld such substitution, stating:

"The Chapal decision was rendered in response to a trustee's petition for instructions. But while such decisions were useful as precedents, they were felt not adequate to protect trustees against the hazards of litigation in particular cases, and the avowed effort of the court to adapt the law to the situation resulting from the depression, failed in practice. Hence the legislature intervened, adopted a rule which the trustee might have applied before, in its discretion, and prescribed it as a definite standard for setting apart income, protecting trustees against liability to remaindermen if they followed it. What appears really to have been taken from the remainderman is his right to question the equity of the rule in his individual circumstances, a right which he had while it was a rule of the court . . . The legislature has furthered certainty at cost of flexibility.

"Constitutional validity of this legislation if it had been made applicable to estates of decedents dying after its enactment is not questioned. It is objected only that application to an estate whose administration began before the Act so as to take away the remainderman's right to judicial examination of the trustee's computation of income makes it void for retroactivity.

". . . The case comes to this: Appellants took remainders at a time when the rules by which to sequester their interests in proceeds from complicated operations to salvage property were so indefinite that several years later the Court made an effort to devise more definitive rules for the purpose. They

were but partly successful, and a few years later the legislature made further and perhaps more authoritative and final rules. Comparing the later with the earlier effort, the remainderman in these particular cases finds himself prejudiced. He says we must confirm him in the earlier by striking down the later of two retroactive rules of law.

"This statute does not purport to open accountings already closed or to take away rights or remainders judicially settled under the old rule. The statute is applied only to judicial settlements pending at or instituted after its enactment. Rights to succession by will are created by the state and may be limited, conditioned, or abolished by it. *Irving Trust Co. v. Day,* 314 U.S. 556. The whole cluster of vexatious problems arising from uses and trusts, mortmain, the rule against perpetuities, and testamentary directions for accumulations or for suspensions of the power of alienation, is one whose history admonishes against unnecessary rigidity. The state may extend the testamentary privilege on terms which permit tying up of property in trust for possibly long periods. But the state on creation of such a trust does not lose power to devise new and reasonable directions to the trustee to meet new conditions arising during its administration such as the depression presented to trusts holding mortgages. Cf. *Home Building & Loan Assn. v. Blaisdell,* 290 U.S. 398. Nothing in the Federal Constitution would warrant us in holding that judicial rules tentatively put forward and leaving much to discretion will deprive the legislature of power to make further reasonable rules which in its opinion will expedite and

make more equitable the distribution of millions of dollars of property locked in testamentary trusts, even if they do affect the values of various interests and expectancies under the trust. The Fourteenth Amendment does not invalidate the Act in question."

It is to be noted that in a separate opinion Justice Douglas, with whom Justice Black concurred, stated:

"That is a question of New York law on which the New York court has the final say. It is none of our business—whether we deem that interpretation to be reasonable or unreasonable, sound or erroneous. *Sauer v. New York,* 206 U. S. 536 545-548. And there is no suggestion here that state law has been manipulated in evasion of a federal constitutional right. *Fox River Paper Co. v. Railroad Commission,* 274 U. S. 651, 657; *Broad River Power Co. v. South Carolina,* 281 U. S. 537, 540. Consequently I can see no possible claim to substantiality of any federal question, whatever view may be taken of the due process clause. I would therefore dismiss the appeal."

C. *The three decisions of Your Honorable Court relied on by Petitioners are clearly distinguishable.*

The Petitioners rely heavily and almost entirely on three decisions of your Honorable Court: *Schlesinger v. Wisconsin,* 270 U.S. 230, 46 S. Ct. 260; *Hoeper v. Tax Commission,* 284 U.S. 206, 52 S. Ct. 120 and *Heiner v. Donnan,* 285 U.S. 312, 52 S. Ct. 358. Each one of those cases is clearly distinguishable from the one at bar.

In *Schlesinger v. Wisconsin,* 270 U.S. 230, 46 S. Ct. 260, your Honorable Court determined that the statute there involved provided for an *arbitrary* classification between transactions which were taxable and similar transactions which were not taxable. Your Honorable Court noted the arbitrary nature of the classification as follows:

> "Gifts inter vivos within six years of death, but in fact made without contemplation thereof, are first conclusively presumed to have been so made without regard to actualities, while like gifts at other times are not thus treated. There is no adequate basis for this distinction . . ."
>
> "A classification for purpose of taxation must rest on some reasonable distinction."

In this case now before your Court the apportionment made in Sections 3 and 5 of the Pennsylvania Principal and Income Act of 1947 is based on a reasonable distinction between what constitutes principal and what constitutes income and reasonably classifies a stock dividend of the same kind and rank as that on which it is issued as principal, as already discussed herein.

In *Hoeper v. Tax Commission*, 284 U.S. 206, 52 S. Ct., 120 the state statute there involved attempted to tax as the husband's income, income which was in actual fact income of the wife, which statute on its face was thus violative of the Fourteenth Amendment. There was no reasonable justification whatever for such taxation. In the instant case, there was, as before discussed, a reasonable classification as principal of stock dividends of the same kind and rank as that on which issued; this was not a determination made by the legislature without regard to actualities; it was a classification based on the true nature and characteristics of such dividends, as already expressed by your Honorable Court in its decisions hereinbefore set forth; it was a classification which the legislature had the authority to make. There just is no comparison between the statute here involved and that involved in the Hoeper case.

Nor is the decision of your Honorable Court in *Heiner v. Donnan, et al.*, 285 U.S. 312, 52 S. Ct. 358, in any way relevant or governing. Congress there sought to tax every gift made within two years prior to death, such gift to be deemed to have been made in contemplation of death. Thus, Congress, was attempting to levy a tax on a mere assumption of a factual situation without any reasonable basis in fact for such assumption. Unless the transaction was in fact testamentary, it had no jurisdiction to tax; it could not give itself jurisdiction to tax by an assumption of a fact having no basis in reason. In the case now before your Court, the jurisdiction of the Pennsylvania legislature in the matter was not in any way dependent upon an assumed set of facts; the legislature admittedly had jurisdiction to determine, in the exercise of its wisdom what is or is not principal or

income. It exercised its jurisdiction properly, having made a reasonable classification based on the true nature and characteristics of the stock dividends here involved.

Petitioners repeatedly state, as they did before the Pennsylvania Supreme Court, that to hold the stock dividends here in question as principal is to go "contrary to the actual facts" and that "under the facts shown in the record below" to hold the stock dividends here in question as principal is unconstitutional. However, the Petitioner does not (and did not in the court below though such omission was remarked upon by Respondent) set forth just what "facts" it has reference to. Their failure to recite such facts upon which they thus place great reliance militates against the strength of their contention. But even if it were to be assumed, for purposes of argument, that Petitioners are arguing that the stock dividends here involved were the result of accumulated undistributed earnings being retained or reinvested by the company, there still would be no violation of any vested rights of the life tenant. As stated by the Pennsylvania Supreme Court in Catherwood, supra:

> "It does not follow, however, that these life tenants have any vested interest in the accumulated unpaid earnings of a corporation, the stock of which is held in the trust *or a vested interest in any particular apportionment formula for the ascertainment of such earnings* * * * (italics ours). It would be just as logical to reason that the life beneficiary of a trust has a vested interest in the particular accounting procedure employed by a corporation at the date that one or more of its shares become a part of the trust corpus as to reason that the life beneficiary has

a vested interest in a particular apportionment formula to ascertain the accumulated earnings of the corporation" (Emphasis supplied).

* * *

"The claimed vested interests of these life tenants is somewhat akin to the claimed vested interests in Com. *ex rel. Fortney v. Bartol,* 342 Pa. 172, 20 A.2d 313.* * * This Court said: 'The budgetary appropriations did not create in (the fire companies) a vested right in any fund.' *No more does an allocation of accummulated unpaid earnings by a corporation to an earned surplus or other account give these life tenants any vested right in such earnings"* (Emphasis supplied).

"Such rights these life tenants have in the income from this trust *but they have no rights to accumulated unpaid earnings of a corporation, nor to any particular mode or method of ascertaining what is or is not income. To hold otherwise would produce absurd results"* (Emphasis supplied).

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari should not be granted.

Respectfully submitted,

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January 1965.